No.

OCT 9 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST INFELICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 A.B.A.J. 1130 (1964) 21

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Petitioner,

VS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ernest Infelice, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The order of the Court of Appeals, unpublished pursuant to Seventh Circuit Rule 28, is reprinted as App. A, *infra.*

Jurisdiction

The order of the Court of Appeals was entered on August 8, 1974. Petitioner's petition for rehearing en banc, timely filed, was denied on September 11, 1974. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Where the prosecution's case against petitioner was wholly dependent upon the testimony of an informant whose in-court testimony was substantially impeached by tape recordings properly in evidence, did not the trial court use an improper standard in evaluating the evidence by disregarding the tapes in order to convict petitioner; and under such circumstances, was not the evidence insufficient, as a matter of law, to support conviction?

2. Did not the trial court abuse its discretion in denying petitioner's motions for polygraph testing, in view of the head-on conflict between the testimony of the informant and that of petitioner, and in light of the fact that the tapes impeached the informant? And are not these such "special circumstances" that the court's refusal to order polygraph testing amounted to an abuse of discretion and a denial of petitioner's right to a fair trial?

3. Was heroin a prohibited controlled substance on any of the dates in question?

A. Did the Attorney General fail to update and republish the schedules of controlled substances as required by law, 21 U.S.C. 812(a), and if so, may petitioner be convicted consistently with due process of law, where the mandatory republication provisions were disregarded?

B. Even if republication was not required until the date deemed necessary by the Court of Appeals (April 27, 1972), can petitioner stand convicted upon Count 4 for a substantive offense on that very date, where the republication in fact was accomplished on May 12, 1972, purportedly nunc pro tunc as of April 27, 1972? Does not such retroactive application to petitioner of the untimely republished schedules amount to a violation of his due process rights

and a violation of the constitutional prohibition against ex post facto laws?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . in any criminal case . . . be deprived of life, liberty or property, without due process of law. . . ."

Article I, Sec. 9, clause 3 of the United States Constitution provides in pertinent part:

> "No . . . ex post facto law shall be passed."

21 U.S.C. 812(a) provides as follows:

> "There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

Provisions of the Federal Register Act, 44 U.S.C. 1501 through 1511, pertinent to Point 3 of this Petition, are quoted and referred to therein.

STATEMENT OF THE CASE

Petitioner, Ernest Infelice, was convicted in a bench trial upon a four-count indictment (73 CR 106) of conspiracy (under 18 U.S.C. 846) to distribute and possess heroin with intent to distribute in violation of 18 U.S.C. Sec. 841(a)(1) (Count 1); and of distributing two separate quantities of heroin on April 14, 1972 (Counts 2 and 3), and another quantity on April 27, 1972 (Count 4), such

substantive offenses being in violation of 18 U.S.C. 841 (a)(1). (A. 1)[1]

The entirety of the government's case against petitioner depended on its witness Robert Burks, who had been convicted previously of a number of crimes, both federal and state, and who had met petitioner and a defendant, McGarry, (found not guilty) while they were all inmates at Leavenworth penitentiary. Burks became an undercover informer for the government, and as such, was equipped with Kel-set recording devices.[2]

At trial, Burks testified he had conversations with petitioner at McCormick Place, Chicago, where petitioner was employed as a dock hand. The first meeting with petitioner on October 21, 1971 was happenstance. (Tr. 401) Burks had come to meet Mario Garelli, a defendant, at McCormick Place, and went there at the suggestion of Brown, another defendant (whose trial was severed). He had met with Mario Garelli a day before (Tr. 301) his accidental meeting with petitioner. On some of the occasions he saw petitioner, he was equipped with a Kel-set device, and on others, there was none. A chronological list of dates of meetings, what was allegedly said by petitioner according to Burks' in-court testimony, and whether or not such matter appeared on the tapes, or in the transcripts of said tapes, is set forth at App. C, *infra.*

Petitioner's pre- and post-trial motions for polygraph testing were denied. (R. 20-21, 79) The court also denied

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[1] "A." refers to petitioner's Appendix filed in the Court of Appeals; "R." to the Record of Appeal filed in that court; "Tr." to the transcript of proceedings at trial.

[2] The government introduced as evidence of their contents (Tr. 1832; A. 11) tape recordings of a number of conversations held between government witness Burks, petitioner, and others. The tapes were made by use of a Kel-set radio transmitter concealed on Burks' person, and the transmitted conversations were taped by officers from radio receivers picking up the same frequency. (Tr. 695-99).

his motion to dismiss the indictment for failure to state an offense because of official non-compliance with the republication requirements of 21 U.S.C. 812(a). (R. 28-29) Petitioner's post-trial motions for new trial in arrest of judgment also were denied. (R. 76)

The indictment charged that petitioner, together with Mario and Chester Garelli, Frank Sarris, Ernest Brown and James McGarry, conspired to distribute and to possess heroin with intent to distribute, and charged petitioner, the two Garellis and Sarris in 3 additional counts with distributing heroin on April 14 and on April 27, 1972.

Chester Garelli and Frank Sarris pled guilty during the course of the trial (R. 54-56); McGarry was found not guilty at the close of the government's case (R. 69-70); and Brown was severed before trial. The remaining defendants, petitioner and Mario Garelli, were tried to the court, without a jury, and were found guilty on all four counts. (R. 72)

Petitioner was sentenced to 10 years imprisonment on each of the four counts, said sentences to run concurrently, with additional provisions for mandatory parole periods of 3 years upon each of the three substantive counts, said parole terms to run consecutive to one another. (R. 90)

Because of the issues involved, petitioner was permitted to remain on bond pending appeal, and the Court of Appeals granted his motion to stay the mandate after affirmance pending the outcome of the instant Petition.

The trial court's comments in rejecting the tapes after they had been received in evidence.

"The result of the foregoing is a gnawing feeling of unreliability as to the Kel-set tapes. To me as a fact finder,

they were scant value, and I have virtually disregarded them.

But accepting them for the moment as evidence of the contents of conversations between Burks and Mario Garelli, or Infelice, as the case might be, it seems to me that in certain instances at least they cut against the Government's case and contradicted it.

The Government understandably argues that the absence of incriminatory conversation on the tapes should not be construed as evidence that the conversation did not take place.

But the Government chose to offer the tapes not only as a circumstance corroborating Burks' in-court testimony that he had had a conversation on a given date, but also to prove part of the contents thereof.

At the time the offer was made, I made clear to the Government what I regarded to be the consequences of the offer. Counsel persisted.

Perhaps I am too simplistic in my analysis, but it seems to me that if the presence of words on the tape is evidence that they were spoken, the absence of words on the same tape is evidence that they were not. And this is particularly so when no explanation for the silence and hisses is offered." (A. 11-12)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

As noted by the Court of Appeals, "The Government's case was built upon the testimony of an informer, Robert Burks." (App. A 3) Petitioner contended on appeal that in view of the evidence presented by way of tape recordings of various conversations which Burks allegedly had with petitioner and with certain co-defendants (not parties to the instant Petition), which contradicted and impeached Burks' in-court testimony, the evidence was insufficient to sustain the convictions, and that the trial court's acceptance of Burks' in-court testimony in the face of the impeaching tapes, which the court rejected, amounted to application of an improper standard in evaluating the evidence. The court disagreed, concluding that the trial court's reliance on Burks' in-court testimony to sustain conviction was justified because of the court's exclusive province in determining both the credibility of the witness and the probative weight to be afforded the tapes. (App. A 10).

Because of the unusual situation—that is, head-on-conflict between the testimony of Burks and that of petitioner, and tapes having been admitted into evidence which impeached Burks—petitioner further contended that the trial court's denial of his pre- and post-trial motions for polygraph testing constituted an abuse of discretion. The reviewing court deemed denial of the motions to have been appropriate within the court's discretion. (App. A 12).

Petitioner further contended that because of official noncompliance with the mandatory updating and republication provisions regarding schedules of controlled substances, heroin was not in fact a controlled substance at the times covered by the indictment. The Court of Appeals disagreed with petitioner's interpretation of the statutory mandate, concluding that republication was in fact accomplished in accordance therewith. (App. A 11-12).

Petitioner seeks a writ of certiorari concerning each of the foregoing contentions, and suggests by way of the arguments which follow that the questions concerning the validity of the schedules of controlled substances, the propriety of disregarding tapes which substantially impeach the government's crucial witness and accepting instead his in-court testimony to sustain conviction, and the extent of permissible discretion to deny motions for polygraph tests in such a case, constitute important questions of federal law within the meaning of Supreme Court Rule 19(1)(6) which have not been, but should be, resolved by this Court.

1.

Because tapes of Kel-set recordings of conversations between government witness Burks and petitioner, which had properly been admitted into evidence, substantially contradicted and impeached Burks' in-court testimony, the court used an improper standard in evaluating the evidence by disregarding the tapes in order to convict petitioner, and the evidence was insufficient, as a matter of law, to convict. Certiorari should be allowed to resolve this question because of the widespread use both of undercover informants and of electronically recorded evidence in federal criminal trials.

The reviewing court apparently accepted the government's position that only credibility was involved; that the trial court could, in its judgment, relegate little, if any, probative value to the tapes and instead believe the in-court testimony of the government's informant and sole occurrence witness—upon whose testimony petitioner's conviction must stand or fall—despite the fact that the tapes, which had been offered by the government both as independent evidence and as corroborative of Burks, (A.

11) substantially impeached Burks, both by way of affirmative contradiction and by total absence from the tapes of the only portion of Burks' in-court testimony implicative of defendant. (App. A 6-10)

The existence of the tapes offered by the government and admitted as evidence by the court, in the factual posture of this case, removes the issue from the simple realm of "credibility," and renders the court's utter disregard of the tapes and their impeachment value in order to convict petitioner wholly improper, reversible error. Moreover, in the light of the tapes, the evidence was insufficient, as a matter of law, to sustain petitioner's convictions.

What Burks testified Infelice said of an incriminatory nature does not appear on the tapes. The trial judge recognized that this constituted evidence which impeached Burks, for he stated:

> "[*I*]*t seems to me that if the presence of words on the tapes is evidence that they were spoken, the absence of words on the same tape is evidence that they were not.* And this is particularly so when no explanation for the silence and hisses is offered." (A. 12) (Emphasis added).

Moreover, certain of the matters implicative of petitioner testified to by Burks were contradicted affirmatively by the tapes. (See App. C)

Although portions of the tapes of Kel-set conversations were partially inaudible, particularly in that unexplained silences, hisses and beeps occur, and although the tapes had been "re-recorded" to filter out background noise, the tapes were admitted as evidence (Tr. 1861-62) both of their contents and as corroborative of Burks' in-court testimony. (A. 11; App. A 6). Such admission was clearly proper. *United States v. Madda,* 345 F.2d 400 (7 Cir. 1965), and indeed the Court of Appeals tacitly assumes the propriety

of admitting the tapes as evidence despite their evident incompleteness.[3]

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[3] This view is accepted among the Circuits. See, *e.g.*, the following cases, all holding partially inaudible Kel-set or directly recorded tapes admissible over defense objection, so long as the inaudible part does not render incomprehensible that which is audible: *United States* v. *Carlson*, 423 F.2d 431, 440 (9 Cir. 1970) (tapes of defendant's meeting with "wired witness" held admissible over defense objection that tapes were partially inaudible; affirmed); *United States* v. *Weiser*, 428 F.2d 932, 936-37 (2 Cir. 1969) (approved admission of tapes; "That some portions of the tapes were inaudible does not necessarily render the entire conversation inadmissible."); *Gorin* v. *United States*, 313 F.2d 641, 651-52 (1 Cir. 1963) ("While it appears that parts of them are inaudible, we cannot say that the parts which are not are without evidentiary value, or that the inaudible parts are so substantial as to make the rest more misleading than helpful."); *Byrnes* v. *United States*, 327 F.2d 825, 835-36 (9 Cir. 1964) ("Because a bit of evidence is so poorly prepared as to be 'unintelligible,' or 'indistinguishable' may persuade counsel proposing to use it not to do so; but such facts alone do not make it inadmissible if it has, in the opinion of the trial court, any probative value whatsoever. And in determining whether it does have such evidentiary value . . . the wise trial judge exercises a liberal discretion [in favor of admission of the evidence.]"); *United States* v. *Avila*, 443 F.2d 792, 795-96 (5 Cir. 1971) ("tape recordings which are partially inaudible are not inadmissible per se unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy."); *United States* v. *Hall*, 342 F.2d 849, 852-53 (4 Cir. 1965) (approving admission of tape which was 25% inaudible); *Addison* v. *United States*, 317 F.2d 808, 815-16 (5 Cir. 1963) (approving admission of tape, approximately one-half of which was "defective"); *Cape* v. *United States*, 283 F.2d 430, 434-36 (9 Cir. 1960) ("But whether the recording is treated as independent or merely corroborative evidence, the test of admissibility is basically the same, and where, as here, it is clear that the inaudible portions ar not substantial and do not render the audible parts unintelligible, the recording is admissible for either purpose"; af-

(Footnote continued)

Once evidence has been admitted, and it is—as here—relevant, legal, and proper evidence, the court cannot simply disregard it, where to regard it renders unbelievable the witness' in-court testimony. The court could not believe both the tapes and the witness; so he chose to disregard the properly admitted tapes.

A trial court may not indulge in such practice; yet the panel approved the judge's choice not to consider the tapes at all—"I have virtually disregarded them." (A. 11) *Cf. Gee Chee On v. Brownell,* 253 F.2d 814, 817 (5 Cir. 1958); *Yip Mie York* v. *Dulles,* 237 F.2d 383, 385 (9 Cir. 1956); *Ramsey* v. *United States,* 263 F.2d 805 (9 Cir. 1959), all to the effect that a trial court may not arbitrarily disregard evidence.

Had this case been tried to a jury, clearly the court could not withdraw from the jury's consideration, properly admitted, relevant evidence. *United States* v. *Bourjaily,* 167 F.2d 993, 995-96 (7 Cir. 1948); *United States* v. *Michener,* 152 F.2d 880, 884-85 (3 Cir. 1945). Yet, sitting, as trier of fact, he permitted himself to do what he could not direct a jury to do.

Suppose in a jury trial, with the same evidence, that the jury had rendered a verdict against petitioner and the court had directed them to disregard the tapes. Suppose further, that the jurors report, after verdict, that they would have acquitted petitioner if they had been permitted to consider the tapes, which impeached the witness, but felt bound to convict him because the court had ordered

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(Footnote continued)

firmed). See also *Walker* v. *State,* 222 So.2d 760 (Fla. Crim. App. 1969) (that tape was inaudible in 150 places did not render it inadmissible), and, see Annot., *Omission or Inaudibility of Portions of Sound Recording as Affecting its Admissibility in Evidence,* 57 A.L.R.3d 746 (1974).

them to disregard the tapes. Assume also that, as here, the tapes were properly admitted as evidence. Is there any doubt that such verdict would necessarily be overturned?

The identical situation here obtains, with the judge sitting as trier of facts. And similarly his improperly reached decision should be reversed.

Indeed, there is even more reason to reverse the judge's ruling, in that the common law rule permitting compromise verdicts by juries does not apply where the judge is the fact-finder. It is essential that the judge be consistent with himself. Where, as here, he reached consistency (*i.e.*, a guilty verdict) only by utterly disregarding proper, competent, legally admitted evidence, such apparent consistency is a fiction and a sham, and must fall under the rule requiring judicial consistency. *United States* v. *Maybury*, 274 F.2d 899 (2 Cir. 1959).[4]

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[4] Although logically inconsistent jury verdicts are permitted because of the "special considerations relating to the nature and function of a jury," *United States* v. *Maybury*, 274 F.2d 899, 902 (2 Cir. 1959), and see *Dunn* v. *United States*, 284 U.S. 390, 393-94, a different rule controls where defendant is tried by the court without a jury.

In *Maybury*, the court rejected the rule of inconsistent verdicts in non-jury trials. After discussing the special considerations permitting inconsistent jury verdicts, the court explained why such reasons are inapplicable to a bench trial. The court stated:

> "None of these considerations is fairly applicable to the trial of a criminal case before a judge. There is no 'arbitral' element in such a trial. While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country,' even when he sits in the jury's place. . . . We do not believe we would enhance respect for law or for the courts by recogniz-

(Footnote continued)

As this Court has recognized:

> "An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. . . . [And while such considerations do not normally aid a defendant,] we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question." *United States* v. *White,* 401 U.S. 745, 753.

As a practical matter, the government ordinarily seeks to use taped or electronically recorded evidence of clandestine conversations involving undercover agents or informants (such as Burks) because such a witness' testimony is frequently suspect; and in the instant case, the government realized that without independent corroboration of Burks' testimony, no tenable case could be presented. (Tr. of Oct. 19, 1973, pp. 21-22) In the case at bar, Burks' testimony is highly suspect because of his extensive prior criminal record and unsavory background, his financial

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(Footnote continued)

> ing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that, for historic reasons, has been granted the jury. *United States* v. *Dotterweich,* 1943, 320 U.S. 277, 279, 64 S. Ct. 134, 88 L.Ed. 48. We know the role of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent.' Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail." 274 F.2d at 903.

Thus, even if by some stretch of the imagination it be concluded it would not be improper for a jury to disregard the tapes in evaluating Burks' credibility, the foregoing rule and logic should eliminate any such argument where a judge, alone, is the trier of facts.

interest in the case,[5] and his personal obligation for the narcotics officers' intervention on his behalf in an unrelated state criminal case.[6] (A. 13, 19)

Burks' testimony was not corroborated by anything in the record, as to the supposed incriminatory conversations with petitioner.[7] The tapes do not corroborate him, even if they be considered, which they were not, and even the government agent who sought to corroborate a conversation which was not taped was disbelieved by the judge. (A. 19) (See App. C 18-19)

Thus, of the *sole* conversation in which petitioner is supposed to have made an important admission against interest regarding his narcotics involvement, there is no corroboration at all; no tape, and a disbelieved narcotics agent.

But the court treated Burks' testimony as though no tapes impeaching and contradicting him were in evidence. The court should have ruled in favor of petitioner's motion for acquittal at the close of the government's case (A. 2), because at that time, the court had not yet improperly

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[5] Burks was paid a total of $17,000 by the government for his "cooperation," more money than he had ever earned legitimately in his life. (A. 13)

[6] One of the federal agents with whom Burks was "cooperating" arranged to assist him on a State pandering charge in Indiana (while the present case was still being prepared by the government); the assistance included securing his release on his own recognizance on the Indiana charge. (A. 19)

[7] "The Court: But we got to Mr. Echeles' argument that there is virtually no implicative language on the tapes with regard to Infelice.

Mr. Marrs (Asst. U.S. Atty.): That's correct." (Tr. 2243; *Cf.* Tr. 2253)

disregarded the evidence of the tapes. That is, in considering the government's case when it rested, the only decision the court could make was acquittal, there not being "substantial evidence which amply supports the district court's denial of defendant's motion for judgment of acquittal." *Cf. United States* v. *Williams*, 311 F.2d 721, 723 (7 Cir. 1963).

In *Hinton* v. *United States*, 196 F.2d 605 (D.C. Cir. 1952), the judge allowed the cases to go to the jury, notwithstanding he considered them "very weak on the evidence." The appeals court reversed because, in their opinion, there was reasonable doubt of guilt. "It is, of course, true that sufficient contradiction of the government's sole eye-witness is not always fatal to the government's case for circumstances may prove a defendant guilty beyond reasonable doubt. But there are no such circumstances here."

Similarly, in the case at bar, there are no other circumstances than Burks' testimonial accusations contradicted by the tapes which had, as their initial purpose, a corroborative intent.

Also to be considered is Burks' remarkable ability to imitate voices other than his own. In taped phone conversations, Burks admittedly simulated the voices of McGarry (Tr. 1603-6), Sarris (Tr. 1613, 1622) and a woman (Tr. 1607). That he did so, shows what a liar he is, and makes it even more important that his testimony should not have been considered without simultaneous consideration of the impeaching tapes.

Certainly, if instead of tapes (which the courts have stated are more reliable than the witness' in-court testimony) the impeaching and contradicting evidence were contained in Grand Jury minutes, could the trial court ignore such impeachment material, absent some credible explana-

tion by the government? As the government has a duty to explain discrepancies between trial and grand jury testimony, *United States* v. *Spangelet,* 258 F.2d 338, 342 (2 Cir. 1958), how could they be excused where recorded tape testimony is more reliable than the witness' recollection and where the absence of alleged words spoken on the tape constitutes evidence of their not having been uttered? (A. 12) [8]

From all the foregoing, it is clear that:

(1) the tapes were properly admitted in evidence;

(2) while admitted in an attempt to corroborate Burks' testimony and as independent evidence of the contents of the conversations, the tapes actually contradicted and impeached him;

(3) the court arbitrarily disregarded the tapes, choosing to believe Burks without the inconvenience of having to reconcile his testimony with the tapes;[9] and

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[8] The explanation offered by the government of the tapes, insofar as petitioner is concerned, was merely that it is one of the "mysteries of the universe." (A. 10) Not only was it a "mystery" that incriminatory words or statements were missing from the tapes, but according to one of the prosecutors, it was "tragic" that words allegedly spoken were not on the tape. (Tr. 2151) (The omitted word on the tape in this instance characterized as "tragic," was the significant word, "dope.")

We submit that the "mystery" of the tapes and the "tragic" matter of the absence of incriminatory words, phrases or sentences, all add up to reasonable doubt that Burks' recollection of those conversations with petitioner occurred in the manner stated by Burks.

[9] Moreover, the prejudicial effect of the court's determination to disregard the tapes was enhanced by the court's refusal to permit petitioner to submit to a polygraph test (See Point 2 of this Petition) either before or after trial. It is thus impossible for a defendant to

(Footnote continued)

(4) under these peculiar circumstances then, the court should have allowed the motion for acquittal. (A. 2)

Indeed, that many similar cases presented by the government depend upon testimony of informants of like character results in the necessity for presenting corroboration of their testimony, often in the form of tapes or other electronic means. And where such evidence exists it must be introduced. *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971).[10] Hence this Court should rule on the proper judicial approach in such cases where the tapes and the informant's testimony do not agree. The situation is not unique—it poses a serious question of great importance to the administration of justice in this country. The instant decision appears to be the only one in which this precise problem occurred, but the general problems involved where tapes must be presented to corroborate an otherwise non-credible informant witness arise often, and there is no judicial expression by this Court for the guidance of District Judges faced with this situation in the trial of federal criminal cases.

Certiorari should therefore be allowed.

(Footnote continued)

protect himself against a false accusation—he may not attempt to enhance his own credibility by use of the polygraph, yet he has no way to defend against a witness who says the defendant made certain statements in a recorded conversation, which statements "mysteriously" do not appear on the tapes. For the court in this instance arbitrarily to disregard the evidence of the tapes under such circumstances is prejudicially erroneous.

[10] Moreover, where, as here, the tapes constitute evidence tending to prove a defendant's innocence, they must be produced under the rule of *Brady* v. *Maryland,* 373 U.S. 83.

2.

Under the circumstances of this case, the court's denial of petitioner's pre- and post-trial motions for polygraph testing of himself and of the government witness amounted to an abuse of discretion, depriving petitioner of a fair trial. Certiorari should be granted so that this Court may set forth guidelines for federal trial judges confronted by such motions, and may speak to the permissible limits of judicial discretion in such situations.

As has been pointed out elsewhere in this Petition, absent from the tapes were the incriminatory portions of Burks' testimony concerning statements allegedly made to him by petitioner. Statements which Burks testified petitioner had made to him simply were not on the tapes. [11]

Faced with the task of proving his innocence in the face of Burks' accusations, petitioner moved the court to appoint a polygraph examiner to conduct examinations upon himself and the principal government witness. (Pretrial motion, A. 1, R. 20; post-trial motion, A. 3, R. 79) Both motions were denied.

In the factual context of this case, such denial constituted prejudicial error and was an abuse of the trial court's discretion.

The reviewing court concluded that the judge had discretion to deny the test, noting that neither petitioner nor the panel had found any cases "that hold that the refusal to order a polygraph examination is an abuse of discretion." (App. A 12)

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[11] See App. C.; see pp. 8-9, *supra.*

The Court of Appeals apparently failed to perceive the import of the peculiar factual circumstances here, concluding that because the judge possesses discretion in this regard, it was properly exercised by denial of petitioner's motions. The court made no attempt to justify the judge's action as being a proper exercise of his discretion under the circumstances, but rather, merely concluded that since it is discretionary, the discretion was properly exercised.

The absence of any reported decisions holding denial of polygraph testing an abuse of judicial discretion has no bearing on the determination whether in this particular case the court's discretion was properly exercised.

Petitioner was not asking the court to enter an unprecedented order. Several federal district courts elewhere have permitted polygraph testing under controlled conditions. See, *e.g., United States* v. *Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972); *United States* v. *Hart*, 344 F. Supp. 522 (E.D. N.Y. 1971).

Indeed, the court in the instant case recognized that the trial court has discretion to grant the motion and appoint a polygraph examiner. (App. A 12)

The Court of Appeals has previously recognized that special circumstances can justify, not only admission of polygraph test results, but even appropriation of government funds for such testing. *United States* v. *Penick*, 496 F.2d 1105, 1109-10 (7 Cir. 1974). (See App. A 12)

We submit that the special circumstances herein, involving the impeachment of the government's sole and only incriminating witness by tapes of the alleged transactions, are substantially similar to those special cirmumstances

surrounding Count I in *Penick, supra,* which impelled the trial judge to grant funds for such testing and to admit the results, and which caused the reviewing court to approve such decision. In each case, doubt as to the informer's credibility constituted the "special circumstances"; in *Penick* the doubt exists because of lack of surveillance, and in the case at bar because of the impeaching tapes. The Seventh Circuit has thus held that such special circumstances justify admission of polygraph test tesults and that this lies within the discretion of the trial court. We submit that this discretion was abused in the instant case.

Here we have the unique circumstance of a defendant who wishes the court to consider tapes which the government has ostensibly sought to use against him. The tapes were made and used because the government realized it had to do something to attempt to make its witness Burks' testimony appear credible. But instead of corroborating him, the tapes impeached Burks, both by inclusion and by omission. Petitioner testified, denying the sum and substance of all the incriminating particulars testified to by Burks—the government's chief and only witness as to those particulars.

Under these peculiar circumstances, the court's refusal to order petitioner and such witness to submit to controlled polygraph testing amounted to an abuse of discretion and deprived petitioner of that fair trial to which he is constitutionally entitled.

In such a case, the court should welcome any assistance in its necessary job of resolving the conflicting testimony. In view of the fact that the tapes impeached Burks, such expert assistance as is available from a skilled polygraph examiner would have been of great assistance to the court

in determining whether to believe Burks or petitioner.[12] Had there merely been head-on conflict between the two *without* the presence of the impeaching tapes, the need for such expert assistance may not have been apparent; but on the facts as they exist on this record—the head-on conflict between Burks and Infelice *plus* the tapes which impeached Burks—the case rises to such special circumstances that refusal to allow the proposed polygraph testing amounts to an abuse of the trial judge's discretion.

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[12] The testimony of a polygraph examiner is in reality opinion evidence, in that the examiner can testify only to his opinion as to whether or not he concludes the subject is or is not telling the truth. The reliability of such opinion—as with all opinion evidence—hinges upon the qualifications of the examiner. Moreover, in a field such as the detection of deception by polygraph examination, the examiner's opinion also depends upon the accuracy and reliability of the apparatus used. Petitioner submits that it is too late to contend that reputable polygraph examiners and their equipment cannot be used as a valuable adjunct to the criminal justice system (subject, of course, to cross-examination, and with the caveat that any such evidence, the basis for which is not shown to be sufficiently reliable and trustworthy, will be disregarded). See discussion in the *Ridling*, *Hart*, and *Penick* cases, cited at p. 19, *supra*.

For literature concerning the operation of modern polygraph equipment, including the physiological and psychological facts underlying the detection of deception technique, see REID & INBAU, TRUTH & DECEPTION (1966); Reid, *Judicial Recognition of the Polygraph (Lie Detector) Technique*, THE JUDGES' JOURNAL, Vol. 11, No. 1, p. 15 (Jan. 1972); Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 A.B.A.J. 1130 (1964); Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L., C. & P.S. 276 (1971).

An excellent discussion concerning polygraph bases and technique is contained in the *Ridling* case, *supra.* According to District Judge Joiner, the author of that opinion, based upon expert testimony he considered in making his ruling, no more than 6% of well-conducted tests (*i.e.,* those conducted with adequate equipment by a properly skilled examiner) result in the conclusion that the examiner cannot tell if the subject is or is not telling the truth; the remaining 94% of well-conducted tests may be interpreted either that the subject is willingly not telling the truth or that the subject is telling the truth. 350 F. Supp. at 92-93. And of the inconclusive tests (*i.e.,* 6% of the well-conducted tests) it has been suggested that many of these become conclusive one way or the other upon retesting. *Ibid.*

We are not suggesting that polygraph testing should put an end to trials for criminal offenses. Rather, we submit that where, as here, there is a head-on collision between the testimony of two live witnesses, and the tape-recorded evidence contradicts the government's principal witness as to the incriminatory particulars in question, the use of polygraph testing can assist the court—subject, of course, to rigorous cross-examination as to the qualifications of the examiner and the reliability of the equipment—in ascertaining who is telling the truth.

With polygraph testing in as high scientific repute as it is today,[13] it can only be suggested that the government's

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[13] Current practice and usage must also be considered. For example, the Illinois Legislature has recognized the widespread use and, by implication, the validity, of lie detector tests. Ill. Rev. Stat. Ch. 38, Sec. 202-1 to -30 involves the regulation of "Detection of Deception" examiners. The statutory scheme provides, *inter alia,* for licensing, registration, minimum standards, internship, and quali-

(Footnote continued)

resistance to petitioner's efforts to seek such verification of the reliability of his and the government's evidence is a result of the government's desire to convict petitioner regardless of the means.

Under such peculiar facts as are here present, competent polygraph testing can provide an invaluable aid to the judge in his difficult task.

In the case at bar, the court's refusal to permit the requested testing amounted to an abuse of discretion because of the peculiar factual setting of this case. The Court of Appeals' opinion merely rubber-stamps the trial court's decision.

Because of the extreme importance of setting out guidelines for federal trial judges to assist them in the proper exercise of their discretion when confronted by motions for polygraph testing, this issue should be decided by this Court.

(Footnote continued)

fications (including a college degree) for detection of deception examiners, and provides criminal penalties for violation of the various regulations and requirements. The very existence of such a statutory scheme implants a legislative "seal of approval" upon licensed members of the profession of detection of deception. It can hardly be argued that such approval would be granted a profession of unsavory or disreputable scientific reliability. Indeed, the standards and other regulations contained in the legislation insure that persons engaging in the detection of deception in the State of Illinois are properly qualified.

Current usage within the district wherein the trial court sits also dictates toward admissibility of polygraph testing results. (See Motion and Memorandum regarding polygraph testing, R. 29 & 79.) For example, the Chief of Police of Chicago, with the expressed approval of the U.S. Attorney's office, recently required his top aides to submit to such testing, and many resigned or were demoted as a result thereof.

Certiorari should be granted to determine whether the trial court should appoint an expert polygraph examiner licensed under the laws of the State of Illinois for purposes of reconsidering petitioner's motion for new trial, and whether petitioner should be acquitted or a new trial be had if such results indicate that petitioner's testimony is truthful or that the testimony of the informer Burks (as to the conversations he claimed took place but which were not on the tapes) is untruthful.

3.

Because the Attorney General and the Bureau of Narcotics failed to publish schedules of controlled substances as required by law, there were no valid schedules, and thus the alleged heroin was not a "controlled substance" during the time alleged in the indictment or set out in the proofs, thus vitiating petitioners' convictions. And even if republication was first required on April 27, 1972, petitioner cannot stand convicted upon Count 4 for a substantive offense on that date, where republication in fact took place at a later date; such retroactive application of the untimely republished schedules to petitioner amounts to a violation of his due process rights and of the constitutional prohibition against ex post facto laws. Certiorari should be granted so that this Court may resolve these questions of statutory construction and constitutional application which affect numerous federal criminal cases.

Petitioner was convicted of conspiracy (21 U.S.C. 846) to possess and sell heroin and with distributing heroin on April 14 and 27, 1972 in violation of 21 U.S.C. 841(a)(1).

The gist of the offenses charged in all counts (1 through 4) of which petitioner was convicted was that the substance in question was, legally, a "controlled substance."

Due to the failure of the Attorney General to comply with the statutory requirements concerning republication of lists of controlled substances, heroin cannot propertly be characterized as a controlled substance during the period shown by the proof, April 14 and 27, 1972. Therefore, no offense was or could have been committed as alleged, and petitioner's convictions should be reversed.

Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812, at p. 28.) The statute establishes five schedules of controlled substances. 21 U.S.C. 812(a). "Such schedules shall *initially* consist of the substances listed in this section." (*Ibid.*, emphasis added.) The statute goes on as follows:

> "The schedules established by this section *shall be updated and republished* on a semi-annual[14] basis during the two-year period beginning one year after the date of enactment of this subchapter and *shall be updated and republished*[15] on an annual basis thereafter." 21 U.S.C. 812(a). (Emphasis added.)

The controversy in the case at bar revolves around the correct construction of 21 U.S.C. 812(a), insofar as it requires periodic updating and republications of the initially established schedules of controlled substances. As petitioner reads the statute, republication was first required one year after the statute's effective date of October 27, 1970—that is, on October 27, 1971—and at various times there-

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[14] Semi-annual means twice a year or every six months. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 787 (1972)

[15] The subsequent schedules are to be promulgated by the Attorney General, see 21 U.S.C. 11, who obviously also is responsible for the required republications.

after as specified in the statute.[16] However, the Court of Appeals read the statute not to require republication as of Oct. 27, 1971, but rather only to specify that such date be used as a starting point from whence subsequent republications must occur. (App. A 11) Thus the court concluded that the first republication was required on April 27, 1972.[17] (App. A 11-12)

From October 27, 1971 (when a full republication should have taken place, but did not) until May 12, 1972 (when full republication was made) heroin was not a controlled substance, because there were no valid schedules due to lack of republication as required during that interim. Thus, any criminal charge alleging a heroin offense between those dates must fall.

In the case at bar, the entire period of the alleged conspiracy and all the alleged overt acts (November 7, 1971, April 13 and 27, 1972, R. 1) fall within that interim period during which there were no valid schedules of controlled substances.

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[16] Under the terms of the statute itself, the schedules created therein as listed were only valid for one year from its effective date; that is, for one year from October 27, 1970; that is, until October 27, 1971.

The complete history of the [illegible] republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed. Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed. Reg. 9545).

However, there was no full republication, *nor any republication at all*, in October 1971, as required by law. 21 U.S.C. 812(a).

[17] In reaching its conclusion, the court made no independent determination, but relied upon its own recent decision in *United States* v. *Nocar*, 497 F.2d 719, 722-23 (7 Cir. 1974), so construing the section. (App. A 11) *Nocar* is pending on Certiorari in this Court.

Pursuant to 21 U.S.C. 812(a) and 44 U.S.C. 1501 through 1511 (Federal Register Act), failure to publish a document required to be published renders the purported regulation invalid.[18] *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944); *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954).

The mandate of publication is no mere technical requirement. Those subject to prosecution for violation of law are constitutionally entitled to know what conduct the law forbids. Indeed, this is a clear requirement of due process of law. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453; *Bouie* v. *City of Columbia,* 378 U.S. 347, 350-51. And where, as here, the *initial* schedules are as provided in 21 U.S.C. Sec. 812(a), with *specific* provision for subsequent updating and republication, those initial schedules were and could be valid only until the date of the first required republication; they lapsed by their own terms on that date.

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[18] Where, as here, republication of revised schedules is required by the terms of the statute itself, such republication must be accomplished by printing in the Federal Register. See Federal Register Act, 44 U.S.C. 1501 through 1511. Specifically, Sec. 1505(a) provides in pertinent part:

"There shall be published in the Federal Register—

. . .

(3) documents or classes of documents that may be required to be published by Act of Congress."

21 U.S.C. 812(a) undisputedly is an Act of Congress requiring publication of documents, to wit, schedules of controlled substances.

Moreover, 44 U.S.C. 1507 provides that no document required to be published in the Federal Register shall be valid as against any person not having actual knowledge thereof until copies have been filed with the Office of the Federal Register and made available for public inspection pursuant to 44 U.S.C. 1503. The logical import is that failure to publish a document required to be published renders it invalid; for without publication of a document required to be published, there is no notice, either actual or constructive. This principle has been judicially recognized in *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944), and *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954).

Thus, by the terms of the Federal Register Act and of the Drug Abuse Prevention and Control Act, by pertinent case law, and by the requirements of due process of law, petitioner's convictions were based on non-existent provisions and should be reversed.

The panel's strained misreading of Sec. 812(a) so as to excuse non-publication as not yet having been required, based, as it was, solely upon the same conclusion having been reached by another panel of the same court,[19] should be reviewed by this Court. No reported cases were discovered from any Circuit wherein this aspect of Sec. 812(a) was construed. In view of the tremendous impact of whichever construction of the statute be adopted upon prosecutions for drug offenses allegedly occurring during the time period when, according to petitioner's reading of the statute, republication should have occurred, but did not, because of the Attorney General's failure to comply with the mandatory republication requirements which also involve due process notice requirements, construction of the statute should be resolved by this Court.

And even if the Seventh Circuit's interpretation of the first required date for republication be accepted—that is, April 27, 1972—there still is a serious question concerning the validity of the republication purportedly dated April 27, 1972, as applied to petitioner in this case. Count 4 of the indictment, upon which petitioner was convicted, alleged a substantive offense *on April 27, 1972.* (R. 1, A. 1)

The republication relied upon by the court as having been accomplished on April 27, 1972, in fact occurred on May 12, 1972, supposedly nunc pro tunc to April 27, 1972. (37 Fed. Reg. 9545). But as applied to Count 4 of this case,

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[19] See footnote 17, p. 26, *supra.*

wherein petitioner was convicted of a substantive offense involving an allegedly controlled substance *on* April 27, 1972, application of the republished schedules which were in fact republished on May 12, 1972, cannot be deemed to render the substance controlled on April 27, 1972. No matter how the publication is captioned, it in fact occurred on May 12, 1972, and cannot constitutionally be applied to conduct taking place from April 27, 1972, to May 12, 1972.

In *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954), the court reversed the conviction of defendant, a commercial fisherman, for having fished in certain prohibited waters, because a regulation purporting to extend the time of the limited prohibition was not published in the Federal Register, as required by law.[20] The schedules of controlled substances, like the fishing prohibition, were valid *only* until a specific date; and accordingly, petitioner, like the fisherman in *Hotch,* cannot, consistently with due process of law, be convicted of having violated a statute dependent upon the controlled nature of the substance involved *after* the date upon which the initial schedules expired. Republication amounts to an extension of the original schedules, and, like extension of the time-limited prohibition in *Hotch,* the schedules cannot be applied to conduct occurring after the expiration date where the republication (extension) did not actually occur on the date it was required.

Application to petitioner of schedules actually published on May 12, 1972, for conduct allegedly occurring on April 27, 1972—the date upo which republication (according to the panel's interpretati of sec. 812(a)) should have, but did not, occur—amounts to an ex post facto law which, of

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[20] This holding was reached regardless of whether defendant had actual notice of the extension. 212 F.2d at 284.

course, is constitutionally forbidden. United States Constitution, Art. I, Sec. 9, clause 3.[21]

Petitioner additionally argued that since republication, when finally accomplished, was done by the Director of the Bureau of Narcotic Drugs, rather than by the Attorney General, as required by law, the purported republications are wholly invalid. (21 U.S.C. Sec. 811; 37 Fed. Reg. 9545; 36 Fed. Reg. 7776) Concluding, as it did, that the republication was accomplished on April 27, 1972, the court did not reach this additional contention that republication was invalid because promulgated by the wrong person. (App. A 11-12) A similar argument impelled this Court to invalidate scores of convictions obtained through the use of illegal wiretaps, which had been "authorized" by persons other than the single person permitted by law to authorize such wiretaps. *United States* v. *Giordano,* ..... U.S. ....., 40 L.Ed.2d 341. Petitioner submits that the question whether the person who caused republication was authorized so to do, and, if not, whether this vitiates convictions obtained on the basis of substances contained on such consequently invalid schedules, should also be decided by this Court, such question not having previously been determined in any decision of which petitioner is aware, and potentially affecting many federal criminal cases.

"If there is a gap in the law, the right and duty, if any, to fill it do not devolve upon the courts." *United States* v. *Laub,* 385 U.S. 475, 486. Alternatively, if the Court

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[21] Nor is this point moot; for while petitioner received concurrent prison terms on each of the four counts for which he was convicted, he must also serve consecutive mandatory 3-year parole terms on each of the substantive counts. (R. 90, A. 3) Hence, if the conviction on Count 4 be upheld, he has an extra mandatory parole term to serve, which he would not have to serve if the judgment on Count 4 were reversed.

is judicially to rewrite the statute, then its opinion should be prospective, only.

To resolve all the foregoing important questions involving construction of federal statutes and constitutional requirements, this Court should grant certiorari.

Conclusion

> "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it's just too much. When that occurs, the law must condemn it as offensive, whether the method used is refined or crude, subtle or spectacular." Judge John R. Brown, specially concurring in *Williamson* v. *United States,* 311 F.2d 441, 445 (5 Cir. 1962).

The time has come in this case, too, when it's just "too much" and the convictions herein should be reversed, or, at the very least, remanded with directions.

If these convictions be permitted to stand, there will no longer be any minimum requirements of a quantum of proof, or a basic credibility, or of any other standard to support a conviction. All that will be required will be an arbitrary determination to accept uncritically the accusation, regardless of its source, and to reject without consideration all denials and outside circumstances inconsistent with guilt.

This petition for certiorari should be allowed in view of the extreme importance of the issues raised herein which have not been, but should be, resolved by this Court.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 — APRIL SESSION, 1974

Nos. 73-2130
73-2131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ERNEST INFELICE and MARIO GARELLI,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 73 Cr. 106
PRENTICE H. MARSHALL, *Judge.*

ARGUED JUNE 6, 1974—DECIDED AUGUST 8, 1974

Before CLARK, *Associate Justice,** SPRECHER, *Circuit Judge,* and BEAMER, *District Judge.***

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* Associate Justice Tom C. Clark of the Supreme Court of the United States [Retired] is sitting by designation.

** District Judge George N. Beamer of the Northern District of Indiana is sitting by designation.

BEAMER, *District Judge.* Defendants were charged along with four other persons in a four-count indictment with violations of 21 U.S.C. §§841(a)(1) and 846.[1] Count I charged Ernest Infelice, Mario Garelli, Chester Garelli, Frank Sarris, Ernest Brown and James McGarry with conspiracy to distribute heroin and to possess heroin with intent to distribute in violation of §841(a)(1). The remaining counts charged Infelice, the two Garellis and Sarris with distributing 1.05 and 275.96 grams of heroin on April 14, 1972, and 293.3 grams of heroin on April 27, 1972. Appellants Infelice and Mario Garelli were found guilty on all four counts after a court trial and each was sentenced to concurrent terms of ten years on each count, together with mandatory parole periods on the substantive counts.[2]

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[1] §841(a)(1) provides:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; . . ."

"Controlled substance" is defined in §802(6) as a drug or other substance, or immediate precursor, included in schedules established by 21 U.S.C. §§811-812.

§846 provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[2] Brown was severed from the other defendants prior to trial; Chester Garelli and Sarris entered guilty pleas during the course of the trial, and McGarry was acquitted at the close of the Government's case.

On this appeal both defendants contend that (1) heroin was not a "controlled substance" during the time alleged in the indictment because the schedules of controlled substances were not updated and published in the *Federal Register* as required by §812(a); (2) the court used an improper standard in evaluating the evidence by refusing to consider tapes of "Kel-set" recordings which had been admitted into evidence; (3) there was insufficient evidence as a matter of law; and (4) the denial of Infelice's motions for polygraph testing of himself and a Government witness constituted an abuse of discretion. In addition, Garelli claims that the "Kel-set" evidence was procured in violation of Illinois law and should not have been admitted, that he was deprived of his sixth amendment right to confront witnesses with respect to the Government's key witness, and that the court erred in allowing voice identification of him based on statements allegedly received in violation of his rights to counsel and due process of law.

The Government's case was built upon the testimony of an informer, Robert Burks. Though the structure of defendants' challenges to the sufficiency of the evidence differ, the arguments of both defendants hinge upon their claim that the trial court improperly credited the testimony of Burks. Infelice argues that the evidence of the Kel-set tapes destroyed Burks' credibility while Garelli contends that the failure of Burks' memory on cross-examination rendered his testimony unreliable.

Burks testified that he had negotiations with Brown in October of 1971 during which he asked when he could see "Crip" (identified by Burks as Mario Garelli) to purchase narcotics. Brown said that he would take Burks' money to Crip and that Mario had said that "old friends would meet later." After learning from Brown that Crip worked

at McCormick Place, Burks found Garelli there on October 20, 1971, and Garelli acknowledged that Burks was doing business with Brown. The next day Burks told Garelli that he feared Brown would rob him, and Garelli said Burks could deal directly with him.

On October 26, 1971, Burks saw Infelice, was directed to Garelli, and showed Garelli $5,000.00. Garelli asked how much Burks expected and was told "a pound an an eighth." Garelli said his "stuff" was good and that he was waiting for his connection. He told Burks to show Infelice the money because he "would be proud of you." When Burks showed the money to Infelice, Infelice told him not to part with it until he had "the dope in the palm of [his] hand."[3]

During the week of November 7, Infelice told Burks that Garelli should have his package soon; Garelli later told Burks the same thing. Chester Garelli, who was with Mario, told Burks they had given Brown a fourth of a "kilo." On November 18, 1971, Chester told Burks that "the package" would arrive in ten days and that it would be very strong.

On January 5, 1972, Infelice told Burks that Mario and Chester had gone to New York to "cop" (which Burks explained as meaning a purchase of narcotics) and that Infelice himself had just returned from Florida where he had gone to "cop." He agreed to have Mario call Burks upon his return. On January 12, Infelice told Burks he had given Mario the phone number; Burks went to Mario, asked if he had been to New York to "cop" and Mario said he had gone but had gotten nothing. He assured Burks that he would be the first to know when Mario was able to obtain something. Burks again saw Mario on

[3] Tr. at 76.

January 28, was directed to Chester, and obtained a package which proved to be ground glass. On February 2 Burks told Infelice that Chester had given him glass; Infelice said he couldn't understand it and and that he knew Mario wouldn't give "bad stuff."[4]

Chester called Burks on April 13, told him he had a package and asked Burks to meet him at the corner of Austin and Madison Streets. Chester was with Sarris, and Sarris told Burks he would sell a quarter kilo for $10,000.00. Burks requested a sample and Sarris said he would call the next day. Sarris delivered the package the next day and told Burks he was dealing with him on the strength of Mario and Chester. The sample contained heroin. On April 15 and 27 Sarris delivered packages to Burks containing heroin in excess of 250 grams each.

On May 12, Burks complained to Infelice about the quality of the heroin and Infelice said, "You know that we wouldn't do you like that, that we wouldn't give you no bad stuff."[5] Infelice said he would have Mario call Burks. On June 7, Infelice told Burks he had told Mario to call, that someone was messing with the package and that Mario wouldn't sell "bad stuff." Burks then went to Chester, told him the narcotics were bad and Chester asked Burks if he would think Chester and Mario were honorable if they have him 45 "spoons" for $3,000.00. Chester said Mario would have Sarris contact Burks and that Chester would stitch the bag to insure against tampering. Two days later Burks conversed with Sarris who said the price would be $5,000.00. No transaction was ever consummated from these final negotiations.

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[4] Tr. at 119

[5] Tr. at 160.

Though Burks was surveilled on several of these occasions, his testimony as to the conversations which occurred was in the main uncorroborated. On certain occasions when he was equipped with a "Kel-set" the machine malfunctioned; the Court found the tapes to be very poor in quality, with long periods of hissing and silence.

I.

Three of defendants' claims are interrelated. The Government introduced into evidence the tape recordings of conversations between Burks and others made by use of the Kel-set radio transmitter concealed on Burks and taped by agents from a radio receiver. Defendants contend that the trial court used an improper standard in evaluating the evidence by refusing to consider these tapes where they allegedly impeached the testimony of Burks. Reliance is placed on the district judge's statement that he "virtually disregarded them." The court, defendants contend, effectively struck relevant evidence from the record. We do not read the court's comments as a reflection upon the admissibility of the taped conversations, but only upon the probative weight he chose to give them. It is clear from the trial judge's comments that he did not cavalierly disregard the evidence as defendants suggest. The court specifically mentioned inconsistencies between the tapes and Burks' testimony and discussed those parts of Burks' testimony which constituted added material from what appeared on the tape. The court plainly indicated that the tapes were offered as independent evidence of the conversations monitored, that at least in certain instances they contradicted the Government's case and that, especially in light of the absence of explanation, the absence of words on the tapes constituted evidence they were not spoken. However, because of the poor quality of the tapes, with long

periods of unexplained hissing and silences, and the failure of the Government to obtain Burks' identification of the speakers, the court found the tapes of "scant value." The trial judge viewed the case as depending upon the credibility of Burks, and the court chose to believe Burks in spite of the tapes. In context, it is clear that the judge "virtually disregarded" the tapes as evidence against defendants and considered them only for their impeachment value.

Garelli asserts that the evidence was insufficient because of the unreliability of the tapes and because of the lack of credibility of Burks which was revealed by his inability to answer questions on cross-examination. Garelli asserts also that the "lapse of memory" by Burks on cross-examination deprived Garelli of his sixth amendment right to confront witnesses. The determination of whether a defendant's sixth amendment right to confrontation has been violated depends upon whether defendant has been deprived of the right to test the truth of the direct testimony. *United States* v. *Rogers,* 475 F.2d 821, 827 (7th Cir. 1973). Burks' lapse of memory here is not comparable to a refusal to answer questions as in *United States* v. *Cardillo,* 316 F.2d 606 (2nd Cir. 1963). Nor is it equivalent to a denial of the right to examine a witness as in *Smith* v. *Illinois,* 390 U.S. 129 (1968). *See United States* v. *Insana,* 432 F.2d 1165, 1168 (2nd Cir. 1970), *cert. denied,* 400 U.S. 841; *California* v. *Green,* 399 U.S. 149, 188-189 (1970) (concurring opinion of Justice Harlan). Garelli was not deprived of the right to test the knowledgeability and credibility of Burks, and thus he was not deprived of his sixth amendment rights.

Garelli is correct in claiming that the informer's weak memory casts doubt upon his credibility. Burks' lapse of

memory was explained by him as caused by the confusing number of dates mentioned by Garelli's counsel.[6] Nevertheless, the trial judge was well aware that Burks stated with "disturbing frequency that he did not recall what was said by who, when, or where." However, as the trial judge noted, cross-examination centered on dates in November, 1971 and 1972 when Burks had little or no contact with Garelli rather than upon the important meetings in October of 1971.[7]

In his findings of fact, Judge Marshall concluded:

> I observed Burks while he testified, twice on direct, and under extensive cross-examination. I believed him. I am persuaded beyond a reasonable doubt of the guilt of Ernest Infelice and Mario Garelli.[8]

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[6] Garelli relies on the fact that Burks was "unable to recall" whether he had conversations with Garelli on cross-examination or the content of such conversations on January 5, 12, and 28, 1972; February 2 and 4, 1972; April 14, 1972, and May 12, 1972, and that he was unable to recall the content of a November 18, 1971 conversation with Mario Garelli. But of these dates, Burks only testified on direct examination that he had conversations with Garelli on January 12 and 28, 1972.

[7] Garelli relies on the fact that Burks was "unable to recall" of employment destroys his credibility. However, Burks stated he lived in the 220 block of West Division Street and worked for a Mr. Ernest at a clothing store on South Wabash Avenue. (Tr. 198-217). Though Burks did state that he could not remember whether he had more than one unrecorded conversation with Garelli in October, he did not, as Garelli contends, state that he was unable to recall whether he had a conversation with Garelli on October 20 or what the conversation concerned. (Tr. 477-481).

[8] Tr. at 25.

It is not our function to weigh the evidence or determine the credibility of witnesses. *United States* v. *Miles*, 401 F. 2d 65, 67 (7th Cir. 1968). The trial judge determined that Burks' testimony was credible in spite of his difficulties in recollection upon cross-examination[9], and we see no basis for substituting our judgment for that of the trial judge who heard the evidence.

Garelli insists that witness' demeanor is an insufficient basis to support the testimony of Burks, relying on *Jackson* v. *United States*, 353 F.2d 862 (D.C. Cir. 1965). The court there found that the action of police officers in arresting two men and searching the wrong one first made their testimony as to the description of the suspect allegedly received from an informant "inherently incredible." There is nothing in the testimony of Burks which is inherently improbable, and it was not, under the circumstances, too weak and incredibile to accept. The trial judge here made the determination of Burks' credibility after careful consideration of the factors militating against his credibility which are raised by defendants—his past background, his possible interest in the outcome, the consistency of his testimony, both internally and in relation to other evidence, and his responses on cross-examination. Accordingly, we are unable to find that the trial judge erred in crediting the testimony. *See United States* v. *Adams*, 454 F.2d 1357 (7th Cir. 1972), *cert. denied*, 405 U.S. 1072; *United States* v. *White*, 470 F.2d 170 (7th Cir. 1972).

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[9] Garelli agrees with the trial judge that the corroboration of the October 26 statements of Garelli on the tapes should be given little weight apart from the testimony of Burks, but disagrees with the judge's assessment of Burks' credibility. In addition to the testimony of Burks, as corroborated by the tapes in part, the conversations between Burks and Brown were overheard and corroborated by Agent James.

The existence of silence on part of the tapes was not a circumstance which was fatal to the Government's case against Infelice or which foreclosed reliance on Burks' testimony by the trial judge.[10] It was the function of the trial judge to determine the probative effect of the silences on the tapes in relation to the credibility of the testimony of Burks. Questions of credibility have no bearing on the insufficiency of the evidence as a whole and are not for the reviewing court's decision. *United States* v. *Karigiannis*, 430 F.2d 148, 151 (7th Cir. 1970), *cert. denied*, 400 U.S. 904. As the court stated in *United States* v. *Miles*, 401 F.2d 65, 67 (7th Cir. 1968):

> The court as the trier of the fact, in this case, must use its experience with people and events, weighing the probabilities presented by the evidence. Thus, assuming that in reaching its decision the court has "problems" with the evidence, its judgment reflects a weighing of all the evidence. If, by its judgment, the court is convinced beyond a reasonable doubt, we can require no more.

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[10] Though defendant Infelice stresses the lack of corroboration of Burks' testimony on the tapes, the October 26, 1971 tape corroborated Burks' testimony that Infelice told him not to give up his money until he got "it" in his hand. Infelice testified that it was his voice on the February 2, 1972, tape which responded to Burks' complaints about powdered glass by saying he didn't think anyone would do that; he also testified it could have been his voice on the May 12 tape discussing the possibility that Sarris had tampered with the package. In addition, though the trial judge indicated that the corroboration of Agent James of the remainder of the May 12 conversation "does tax my credulity," he did not indicate that he disbelieved it. The only contradiction between the tapes and Burks' testimony, other than implication from silence, is Burks' testimony that he asked Infelice on January 12 whether he gave Burks' number to Mario; the tape indicated that Infelice gave Burks the number of Garelli.

We find no error in the trial court's findings of guilty based on the testimony of Burks.

II.

The defendants' contention with respect to the publication of schedules of controlled substances was recently considered in *United States* v. *Nocar,* No. 73-1703 (7th Cir., decided May 31, 1974). 21 U.S.C. §812(a) provides for republishing of schedules of controlled substances on a semiannual basis during the two-year period beginning one year after the enactment of the subchapter.[11] In response to the claim that schedules should have been republished on October 27, 1971, one year after the enactment of Subchapter I of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Judge Pell, speaking for the Court in *Nocar,* stated:

> We disagree with the defendants' reading of section 812(a). The second sentence of the provision does not require republication on October 27, 1971. Rather, it directs that that date be used to determine when, during the following two years, the six-month demarcations are to fall. Therefore, the first republication was due on April 27, 1972, eighteen months after the enactment of the subchapter and one half year after the first anniversary.
>
> (Slip opinion at 6).

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[11] In pertinent part, §812(a) provides:

"There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

The last of the overt acts of the conspiracy and the last of the substantive offenses charged in the indictment here occurred on April 27, 1972. Therefore, the alleged violations of the law occurred before or on the day set by statute for updating and republishing the schedules, and a valid prohibition was in force.

III.

Defendants contend the trial judge erred in denying motions for polygraph examinations of defendants and Burks, arguing that current practice and usage indicate the high scientific repute of polygraph testing. It is clear that the admission of such evidence is within the discretion of the trial judge. *United States* v. *Chastain,* 435 F.2d 686 (7th Cir. 1970). The appointment of a polygraph examiner also lies within the judge's discretion. *United States* v. *Penick,* No. 73-1608 (7th Cir., decided May 8, 1974). Since both the appointment of a polygraph examiner and the admission in evidence of the results are discretionary, it follows that the judge had discretion to deny the test. Appellants have cited no cases—and we have found none—that hold that the refusal to order a polygraph examination is an abuse of discretion.

IV

Garelli contends that the Kel-set transmissions and recordings constituted electronic eavesdropping and overhearing contrary to Illinois law which prohibits use of an eavesdropping device to hear or record conversations and except with the consent of any one party to the conversation and at the request of a State's attorney. *Ill. Rev. Stat.* Ch. 38, §14-2(a). The question of admissibility does not turn upon whether evidence was obtained in violation of state law. Federal law governing the admissibility of evi-

dence in federal criminal trials permits the introduction of such tape recordings. *United States* v. *Escobedo*, 430 F.2d 603, 607 (7th Cir. 1970), *cert. denied*, 402 U.S. 951; *United States* v. *Teller*, 412 F.2d 374 (7th Cir. 1969), *cert. denied*, 402 U.S. 949; 18 U.S.C. §§2511(2)(c), 2517(3).

V

Garelli's last argument is that voice identification by Agent James deprived him of his right to counsel and due process. Agent James arrested Garelli after indictment, and Garelli responded "yes" to the question of whether he understood the constitutional rights read to him. James har earlier overheard a transmitted conversations which occurred on October 26, 1971, betwen Burks and another person. At trial he testified that he recognized the voice he heard on October 26 as that of Garelli on the basis of Garelli's responses at the time of his arrest.

First, Garelli was not deprived of his right to counsel because the confrontation which occurred was not a "critical" one requiring counsel to compensate for advantages of the prosecuting authorities. The conversation on which James based his identification was preserved on tape which eliminated the risk of unintentional suggestion and impediments to confrontation at trial. "If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.'" *United States* v. *Ash*, 413 U.S. 300, 316 (1973). As the Supreme Court indicated in *United States* v. *Wade*, 388 U.S. 218 (1967) with respect to equivalent matters of handwriting examples and blood tests:

> Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a

> meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.
>
> 388 U.S. at 227-228.

We therefore conclude that Garelli was not deprived of his right to counsel by the voice identification procedures followed by Agent James. Cases cited by the defendant involving the fifth amendment have no application to voice identification. *United States* v. *Dionisio,* 410 U.S. 1 (1973).

Garelli also argues that the confrontation violated his right to due process under *Stovall* v. *Denno,* 388 U.S. 293 (1967). Since the identification by James was made with reference to a recorded conversation, the confrontation was not conducive to irreparable misidentification.[12] Therefore, the identification by James did not deny Garelli due process of law. *See United States* v. *Ryan,* 478 F.2d 1008 (5th Cir. 1973).

Accordingly, the judgments of conviction will be affirmed.

AFFIRMED

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[12] In addition, it is arguable that such a show-up is for the purpose of arrest rather than identification and was therefore imperative. *See* Stovall, *supra,* at 302.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

September 11, 1974.

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX C

Summary of Facts

On October 21, 1971, Burks said he had a conversation with Mario Garelli. He stated petitioner was somewhere present in the area, but there was no testimony that petitioner either participated in or overheard the conversation between Mario Garelli and Burks. On this date, Burks was not equipped with any recording device. (Tr. 301)

On October 26, 1971, Burks testified, he had a conversation with Mario Garelli at McCormick Place, where Garelli also worked. The agents had given him $5000 with which to purchase narcotics, and he showed the money to Garelli who told him to show the money to petitioner who would be "proud" of him. On this occasion he was equipped with a Kel-set recording device. He testified he riffled the money when he saw petitioner, who allegedly said, "be careful with the money. Don't give up no money until I get the dope in my hand." (Tr. 426). The transcript of the conversation on the tape did not contain the word "dope" (Tr. 428). As to this supposed conversation which occurred on Burks' second meeting with petitioner at McCormick Place, Burks testified he could not show the money to petitioner the first time, because Infelice was "too busy." However, on cross-examination, it was shown that petitioner and Burks had a long conversation about a mutual inmate-acquaintance who had received a furlough from Leavenworth to travel to Chicago without guard to attend a funeral. (Tr. 333-340).

During the week of November 7, 1971 (neither Burks nor the agents providing a specific date) Burks testified

that in a conversation with petitioner, petitioner said that Mario Garelli would have the package soon. But nothing of this nature appeared on any Kel-set recording.

On January 5, 1972 Burks testified that petitioner said the Garellis went to New York "to cop" and that he had gone to Florida "to cop" for friends with big money, but that none was to be had. Although Agent James testified that segments of the conversation were monitored with a Kel-set, nothing of this nature appeared thereon; the Kel-set "malfunctioned." (Tr. 1159).

On January 12, 1972 there appears a Kel-set recording containing the information that petitioner gave Burks Mario Garelli's number and told Burks where Mario was working at McCormick Place. This conversation appears on the tape recording.

On January 28, 1972 petitioner again told Burks where Mario was working at McCormick Place. (Tr. 111).

On February 2, 1972 petitioner told Burks that Mario and Chester would be back Friday. Burks told petitioner that Chester gave him a "sample containing powdered glass" and petitioner is supposed to have said, "I don't think he'd do it on purpose." Although the Kel-recording was made, there elisions appear in the transcript; but petitioner did testify that he said he didn't think anybody would do anything like that. (Tr. 2011).

On February 4, 1972 petitioner told Brown that Mario and Chester wouldn't be back at McCormick Place until 4:30. Burks asked petitioner, "Did you check on the job?" (Burks was always asking Infelice whether he could get him employment at McCormick Place). This innocuous conversation was received in its entirety on the Kel-set device.

On May 12, 1972,[1] Burks was equipped with a Kel-set. Agent James followed him into McCormick Place, but "neglected" to activate the recording device in the brief case carried by James. (Prior to this occasion, on April 14, and again on April 17, 1972, Burks had purchased narcotics for a total of $18,000 from Frank Sarris and Chester Garelli). On the occasion of May 12, 1972, Burks testified he met petitioner as petitioner was leaving the basement cafeteria at McCormick Place at around noon time. He told petitioner the stuff was very bad; petitioner said he knew Mario wouldn't give him bad stuff. Petitioner allegedly said, "we wouldn't do you like that, that we wouldn't give you no bad stuff." Burks said he spent $18,000 and can't get any money back. "I'm going to see Mario." (Tr. 161).

As this conversation was the most incriminating conversation against petitioner, the government attempted corroboration with narcotics agent James, who testified that when he realized his recording device was not working, he approached the area where Burks and petitioner were walking; and as he crossed them he heard petitioner speak the sentence that Burks had testified to. (Tr. 1103).[2] On

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[1] Before this date, on May 5, 1972 Agent James had learned that Burks had been arrested and was in custody in Indiana on some prostitution charge. The agents secured his release on no bond and arranged to have the State charges dismissed. (A. 19).

[2] Two defense witnesses who were employed at McCormick Place for many years testified, without contradiction, that it was impossible for the cafeteria vestibule area to be free of persons going to and coming from the cafeteria around the noon-hour-time, the time when James testified no one was around by the three—James, Burks and Infelice. (Tr. 1955-1994).

cross-examination. James was required to demonstrate the crossing situation in the well of the court room. Because of the demonstration and because of the conflict between James' in-court testimony and his statements about the recording device as they appeared in his 3500 statement, the court totally disbelieved his testimony in this connection, stating it does "tax my credulity." (A. 19). The entirety of the May 12, 1972 supposed conversation does not appear on the 3500 statement of Burks (Tr. 290-291)

When they left the cafeteria, petitioner had another conversation with Burks with respect to a job. When Burks asked petitioner "Got that job for me?" that request was recorded on the tape. Additionally, when Burks spoke of "Frank"—meaning Chester Garelli—petitioner's voice is recorded on the tape as asking, "Who's Frank?"

On the final date, on June 7, 1972 when Burks went to petitioner to ask for a job, their conversation about employment at McCormick is reflected on the tape of the Kel-set recording, and on the transcript of the recording. (Tr. 418-19). However, Burks testified that he complained about the stuff being bad and that petitioner said he would have Mario to call and that petitioner said that Mario wouldn't do that, that somebody must be messing with the package. Although the Kel-set device was operating, this matter neither appeared on the tape nor on any transcript made from the tape. (Tr. 417-19).

Petitioner testified as to the encounters with Burks at McCormick Place and denied specifically any conversation which imputed his participation in narcotics sales. He recognized his voice on the tapes.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-407

ERNEST INFELICE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5397

MARIO GARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not reported.[2]

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[1]"Pet. App." will refer to the appendices to the petition in No. 74-407.

[2]The judgement of affirmance is reported at 500 F. 2d 1406.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1974, and a timely petition for rehearing was denied on September 11, 1974 (Pet. App. B). The petition for a writ of certiorari was filed on October 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether heroin was a "controlled substance" at the time charged in the indictment.

2. Whether the trial court properly evaluated certain recordings of petitioners' conversations.

3. Whether the trial court's denial of a motion for polygraph tests was an abuse of discretion.

4. Whether conversations recorded in violation of state law are admissible in a federal trial.

5. Whether a government witness' lapses of memory on cross-examination impermissibly frustrated the right of confrontation.

6. Whether a government agent may testify as to a voice identification made during the course of arrest.

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on four counts of distributing heroin and of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 841(a)(1)

and 846.[3] They were sentenced to concurrent terms of ten years' imprisonment on each count, to be followed by consecutive special parole periods on the substantive counts. The court of appeals affirmed (Pet. App. A).

The government's case was based principally upon the testimony of an informant, Robert Burks, who had negotiated for several months to buy $18,000 in heroin from petitioners and their co-defendants. On certain occasions Burks had been equipped with a "Kel-set" recording device, which was used to record some of his conversations with petitioners.

Negotiations between petitioners and Burks began in October 1971. At first they dealt through an intermediary, Ernest Brown, but Burks and Garelli later agreed to deal directly (Tr. 70). At a meeting in late October, Burks showed Garelli $5,000 and told him he could get $5,000 more (Tr. 757). Garelli agreed that Brown had mishandled the negotiations; he asked how much heroin Burks' people wanted and how much he thought he could distribute (Tr. 74). Burks said he had been dealing for a pound and an eighth; Garelli responded that he was waiting for his "connect" and assured Burks that "the stuff is going to be real good" (Tr. 75). Burks and Garelli then approached Infelice, who had been nearby. Burks showed Infelice the $5,000; Infelice cautioned him to be careful with

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[3]Four other defendants were indicted with petitioners. Two, Ernest Brown and James McGarry, were charged only with conspiracy. Brown's case was severed from that of the other defendants prior to trial. McGarry was acquitted at the close of the government's case. The remaining two, Chester Garelli and Frank Sarris, were charged on all counts and entered pleas of guilty during the trial.

his money because there were a lot of "stool pigeons" around and instructed him not to give up his money until he had "the dope in the palm of [his] hand" (Tr. 76-77, 760, 1357).

During the week of November 7, both Garelli and Infelice told Burks that his package would arrive soon, and Garelli advised him to hold onto his money (Tr. 80). At the same meeting, Garelli introduced Burks to his brother, Chester Garelli, and told Burks not to forget Chester's face (Tr. 81).

On January 5, 1972, Infelice told Burks that Garelli had gone to New York to "cop" some heroin, and that he, Infelice, had just returned from a similar mission in Florida (Tr. 106). On January 12, Garelli told Burks that he had gone to New York but had been unable to buy any heroin; he assured Burks that he would be first on the list whenever some became available (Tr. 106-109). On January 28, Burks again approached Infelice and Garelli. Garelli asked Burks if he still had $10,000 and directed him to meet Chester at a designated rendezvous (Tr. 111). Chester there gave Burks a tinfoil package that turned out to contain ground glass. On February 2 Burks complained about this transaction to Infelice, who said he couldn't understand it because he knew Garelli wouldn't distribute "bad stuff" (Tr. 119-120).

Subsequent negotiations, however, resulted in two sales to Burks of a total of about 550 grams of heroin-laden powder for $18,000. When Burks complained to Infelice about the quality of the heroin, Infelice told him, "You know we wouldn't do you like that, we wouldn't give you no bad stuff" (Tr. 160, 1103).

ARGUMENT

1. Petitioners both contend (Infelice Pet. 24-31; Garelli Pet. 14-20) that the alleged failure of the Attorney General and the Director of the Bureau of Narcotics and Dangerous Drugs to republish and update the schedules of controlled substances as directed by 21 U.S.C. 812(a) warrants reversal of their convictions. Section 812(a), which lists heroin as a controlled substance, provides in part:

> * * * The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter [October 27, 1970] and shall be updated and republished on an annual basis thereafter.

The plain language of the statute requires semiannual republication during a two-year period beginning October 27, 1971. The first republication was therefore not required until April 27, 1972. See *United States* v. *Nocar*, 497 F.2d 719 (C.A. 7), certiorari denied, No. 74-131, November 25, 1974. Accordingly, from October 1971 through April 27, 1972—the period during which petitioners' offenses occurred—heroin plainly was a controlled substance under the statute.[4]

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[4]Infelice argues in the alternative that at least his conviction on count four of the indictment, charging a substantive offense on April 27, 1972, violates the prohibition against *ex post facto* laws. But the schedule of controlled substances would not have lapsed until the end of that day, even assuming republication was otherwise untimely. The court below properly held that all petitioners' "violations of the law occurred before or on the day set by statute for updating and republishing the schedules, and a valid prohibition was in force" (Pet. App. A, p. 12).

2. Petitioner Infelice contends (Pet. 8-17) that certain taped conversations impeached Burks and that the trial court, by "virtually disregarding" the tapes, struck relevant evidence from the record and convicted petitioner on insufficient evidence. These contentions were thoroughly discussed and properly rejected by the court of appeals, on whose opinion we rely (Pet. App. A, pp. 6-7, 10):

> We do not read the court's comments as a reflection upon the admissibility of the taped conversations, but only upon the probative weight he chose to give them. It is clear from the trial judge's comments that he did not cavalierly disregard the evidence as defendants suggest. The court specifically mentioned inconsistencies between the tapes and Burks' testimony and discussed those parts of Burks' testimony which constituted added material from what appeared on the tape. The court plainly indicated that the tapes were offered as independent evidence of the conversations monitored, that at least in certain instances they contradicted the Government's case, and that, especially in light of the absence of explanation, the absence of words on the tapes constituted evidence they were not spoken. However, because of the poor quality of the tapes, with long periods of unexplained hissing and silences, and the failure of the Government to obtain Burks' identification of the speakers, the court found the tapes of "scant value." The trial judge viewed the case as depending upon the credibility of Burks, and the court chose to believe Burks in spite of the tapes. In context, it is clear that the judge "virtually disregarded" the tapes as evidence against defendants and considered them only for their impeachment value.

* * * * *

* * * It was the function of the trial judge to determine the probative effect of the silences on the tapes in relation to the credibility of the testimony of Burks. Questions of credibility have no bearing on the insufficiency of the evidence as a whole and are not for the reviewing court's decision. *United States* v. *Karigiannis,* 430 F.2d 148, 151 (7th Cir. 1970), *cert. denied,* 400 U.S. 904.

3. Petitioner Infelice's contention (Pet. 18-24) that the trial court abused its discretion by denying his motion for polygraph examinations of himself and Burks was likewise correctly rejected by the court of appeals. Trial courts properly exercise broad discretion in acting upon such requests, especially where, as here, the court is also sitting as trier of fact and has the opportunity of observing and examining the witnesses directly and weighing their credibility at first hand. See, *e.g., United States* v. *DeBetham,* 470 F. 2d 1367 (C.A. 9), certiorari denied, 412 U.S. 907; *United States* v. *Penick,* 496 F. 2d 1105 (C.A. 7), certiorari denied, No. 73-6846, October 21, 1974; *United States* v. *Frogge,* 476 F. 2d 969 (C.A. 5), certiorari denied, 414 U.S. 849.

4. Petitioner Garelli contends (Pet. 6-9) that conversations allegedly recorded in violation of state law were inadmissible at his federal trial.[5] But as the court of appeals properly observed (Pet. App. A, pp. 12-13):

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[5]Illinois law forbids a person from using "an eavesdropping device to hear or record all or any part of any conversation unless he does so with the consent of any one party to such conversation and at the request of a State's Attorney * * *." Ill. Rev. Stat., Ch. 38, Section 14-2(a). We do not believe that this statute was intended to apply to the otherwise lawful use of recording devices by federal agents.

> The question of admissibility does not turn upon whether evidence was obtained in violation of state law. Federal law governing the admissibility of evidence in federal criminal trials permits the introduction of such tape recordings.

See *United States* v. *Escobedo*, 430 F. 2d 603 (C.A. 7), certiorari denied, 402 U.S. 951; *United States* v. Teller, 412 F. 2d 374 (C.A. 7), certiorari denied, 402 U.S. 949; *United States* v. *McGuire*, 381 F. 2d 306 (C.A. 2), certiorari denied, 389 U.S. 1053.

5. Petitioner Garelli's contention (Pet. 9-11) that Burks' lapse of memory on cross-examination deprived him of the right of confrontation is without merit.[6] As the court of appeals noted (Pet. App. A, p. 7):

> The determination of whether a defendant's sixth amendment right to confrontation has been violated depends upon whether defendant has been deprived of the right to test the truth of the direct testimony. * * * Burks' lapse of memory here is not comparable to a refusal to answer questions as in *United States* v. *Cardillo*, 316 F. 2d 606 (2nd Cir. 1963). Nor is it equivalent to a denial of the right to examine a witness as in *Smith* v. *Illinois*, 390 U.S. 129 (1968). * * * Garelli was not deprived of the right to test the knowledgeability and credibility of Burks * * * .

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[6]Burks' memory was not as faulty as petitioner suggests. First, the cross-examination focused on dates during and after November 1971, when Burks had little or no contact with Garelli, rather than upon the important meetings in October 1971. Second, petitioner characterizes certain of Burks' responses in a misleading manner. For example, he states that Burks could not recall his own address or his recent place of employment (Pet. 10). In fact, Burks was asked where he lived in October 1971 and the early part of 1972. He responded that he had lived in the 2200 block of West Division Street but was unable to recall the precise address number (Tr. 198-200). Similarly, he was asked where he had worked prior to July 1971. While he was unable to recall the name of the company, he stated that he worked for a Mr. Ernest at a clothing store located on South Wabash Avenue (Tr. 214-217).

6. Petitioner Garelli's final contention (Pet. 11-14) is that a voice identification made by a federal agent during the course of arrest is not admissible where the arrest occurs after the indictment and outside the presence of counsel. This argument is insubstantial.

Agent James had overheard and recorded a conversation between Burks and an unidentified person on October 26, 1971. He did not observe the conversants. He arrested Garelli, after indictment, in November 1972. Based on what Garelli said to him at the time of arrest, James identified Garelli's voice as that belonging to the other party to the October 26, 197 , conversation with Burks.

An accused has the right to counsel at every "critical stage" of the proceedings against him. *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263; *Stovall* v. *Denno,* 388 U.S. 293. An identification is critical "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade, supra,* 388 U.S. at 224. Counsel is needed then, as he would be needed at trial, to counteract suggestive influences or manipulation by the prosecutor and, thus, to reduce the possibility of an irreparably mistaken identification. An identification is not critical, however, where "the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." *United States* v. *Ash,* 413 U.S. 300, 315. Thus, where the defense has an adequate opportunity of re-constructing the identification procedure before the trier of fact and impeaching the identification through cross-examination, absence of counsel at the original identification is not prejudicial.

The defense had such an opportunity here. Petitioner's counsel cross-examined James to reconstruct the arrest scene (Tr. 729-732, 734-735, 738-739), and the voice identified was recorded and preserved on tape, available for comparison. Petitioner therefore had ample opportunity to challenge the credibility of the agent's identification through courtroom demonstration or expert voice analysis.

At bottom, petitioner's contention is that he has a Sixth Amendment privilege against post-indictment arrest in the absence of counsel. Any such privilege would of course intolerably interfere with effective law enforcement. The arrest was lawful, petitioner was properly informed of his rights, and any pertinent observations made by the arresting officers were admissible without regard to the presence or absence of petitioner's counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1974.

No. 74-407

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In the Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST INFELICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER INFELICE'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Prefatory Statement

Petitioner, Ernest Infelice, files this, his Reply to the Brief for the United States, pursuant to Rule 24(4).

For the most part, petitioner relies upon his Petition for Certiorari heretofore filed. However, in view of the position taken by the United States, petitioner deems it necessary to clarify his position to this Court, and to note that certain representations as to purported factual matters as contained in the government's "Statement" (Br. in Opp. pp. 2-4) do not correctly portray the facts as developed by the evidence at trial.

Clarification of Statement of Facts

Petitioner takes issue with the following purported "facts" as set forth in the government's Brief in Opposition (pp. 2-4) and calls to the Court's attention the following explanatory or contradictory evidence:

(1) "Infelice . . . instructed him [Burks] not to give up his money until he had 'the dope in the palm of [his] hand'." (Br. in Opp. pp. 3-4) While Burks testified to this effect (Tr. 426), *the transcript* of the Kel-set recording that had been made of this conversation *did not contain the word "dope"*. (Tr. 428)

(2) ". . . Infelice told Burks that his package would arrive soon . . ." (Br. in Opp. p. 4) While Burks so testified, nothing of this nature appeared on any Kel-set recording.

(3) ". . . Infelice told Burks that Garelli had gone to New York to 'cop' some heroin, and that he, Infelice, had just returned from a similar mission in Florida." (Br. in Opp. p. 4) While Burks testified that Infelice had used the phrase "to cop," he did *not* testify that Infelice said, "to cop some heroin;" rather, *Burks himself* explained that "to cop" meant to purchase narcotics. (See opinion of Court of Appeals, at p. App. 4 of Petition for Certiorari.) Moreover, although Agent James testified that segments of this alleged conversation were monitored with a Kel-set, nothing of that nature appeared on any transcripts; the Kel-set allegedly "malfunctioned." (Tr. 1159)

(4) ". . . Infelice told him [Burks], 'You know we wouldn't do you like that, we wouldn't give you no bad stuff'." (Br. in Opp. p. 4) However, the Kel-set with which Agent James was supposed to be monitoring this conversation had not been activated, and James' purported corroboration thereof was disbelieved by the trial

court ("it does tax my credulity" A. 19); moreover, such statement does not appear on James' 3500 material. (See Summary of Facts, pp. App. 18-19 of Petition for Certiorari.)

• • •

Petitioner further calls to the Court's attention that Burks' initial meeting with petitioner at petitioner's place of employment was happenstance, rather than planned (Tr. 401), and that each subsequent encounter between them resulted when Burks sought petitioner out at his place of employment; Burks was always asking petitioner to help him find a job, and on at least one occasion the two had an extended conversation unrelated to any criminality concerning a mutual acquaintance. (See pp. App. 16-17 of Petition for Certiorari)

Reply to Government's Argument

1. Petitioner relies on the argument in his petition concerning the invalidity of the schedules of controlled substances (Pet. pp. 24-31), except to note as follows:

The government relies upon a republication which purportedly took place on April 27, 1972 to counter petitioner's alternative argument attacking his conviction upon count 4. (Br. in Opp. p. 5, fn. 4) However, it has not answered petitioner's contention (Pet. pp. 28-30) that such republication cannot constitutionally be applied to conduct on April 27, 1972 (the date of the substantive offense alleged in count 4) since republication *actually* took place on May 12, 1974, although purportedly nunc pro tunc April 27, 1974. (37 Fed. Reg. 9545)

Moreover, the government has not even attempted to answer petitioner's contention that republication was invalid because promulgated by the wrong person. (Pet. pp. 30-31)

2. Regarding his argument that the trial court improperly disregarded impeaching material in and omissions from the tape recordings, and that consequently the evidence against him was insufficient, petitioner substantially relies on the argument in his Petition (pp. 8-17), except to note that the government has seen fit only to rely upon the opinion of the Court of Appeals rejecting this contention. (Br. in Opp. pp. 6-7) No attempt has been made independently to justify the trial court's utter disregard of the impeachment value of the tapes and its reliance instead upon uncorroborated testimony of Burks (in that the only incriminatory words Burks claims petitioner uttered were not on any tapes or transcripts).

Moreover, the government is silent as to the importance and necessity of this Court's formulation of standards for the guidance of trial courts faced with similar situations involving contradictions between the in-court testimony of an informant and tapes of the meetings allegedly described in such testimony.

3. As to the denial of petitioner's motions for polygraph testing constituting an abuse of the trial court's discretion in the peculiar facts of this case, petitioner substantially relies on the argument in his Petition. (pp. 18-24)

The government's argument on this issue (Br. in Opp. p. 7) merely restates a proposition which petitioner concedes, that is, that whether or not to allow such a motion is within the trial court's discretion. But neither the government nor the Court of Appeals saw fit to apply the standard of judicial discretion to the peculiar facts of the case at bar; each wishes to justify the court's ruling solely by virtue of the existence of such discretion. Petitioner wishes to stress that only because of the peculiar factual

setting herein does he contend that denial of his motion for polygraph testing below constituted an abuse of discretion. Petitioner urges this Court to set forth some guidelines for trial courts confronted with situations where, as here, there is a direct conflict between the testimony of an informant and that of a defendant, and tapes exist which contradict and, impeach the informant's in-court testimony.

Conclusion

For any or all of the reasons as set forth in his Petition, as amplified by this Reply, each of which constitutes an extremely important issue which has not been, but should be, decided by this Court, certiorari should be allowed to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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vs.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
35 E. Wacker Drive
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UNITED STATES OF AMERICA,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ernest Infelice, prays that rehearing be allowed, and that upon such rehearing, a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

This Court's order denying the petition for Writ of Certiorari was entered on January 13, 1975. This Petition for Rehearing is timely filed within 25 days of said date in accordance with Rule 58(2).

Prefatory Statement

As noted by the Court of Appeals, "The Government's case was built upon the testimony of an informer, Robert Burks." (App. A. 3)[1] Petitioner contended on appeal that in view of the evidence presented by way of tape recordings of various conversations which Burks allegedly had with petitioner and with certain co-defendants (not parties to the Petition for Certiorari or to this Petition for Rehearing), which substantially contradicted and impeached Burks' in-court testimony, the evidence was insufficient to sustain petitioner's convictions, and that the trial court's acceptance of Burks' in-court testimony in the face of the impeaching tapes, which the trial court rejected, amounted to application of an improper standard in evaluating the evidence. The Court of Appeals disagreed, concluding that the trial court's reliance on Burks' in-court testimony was justified because of that court's exclusive province in determining both the credibility of the witness and the probative weight to be afforded the tapes. (App. A. 10)

Because of this unusual situation—that is, head-on conflict between the in-court testimony of Burks and that of petitioner, and tapes having been admitted into evidence which impeached Burks' in-court testimony—petitioner further contended that the trial court's denial of his pre- and post-trial motions for polygraph testing constituted an abuse of discretion. The reviewing court deemed denial of the motions to have been appropriate within the trial court's discretion.

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[1] "App. A" refers to Appendix A to the Petition for Certiorari, consisting of the Court of Appeals' Unpublished Order affirming petitioner's conviction.

These issues were among those presented to this Court in the Petition for Certiorari which has been denied.

Since the time of filing of the Petition for Certiorari and the present time, counsel for petitioner has discovered a line of authority supportive of petitioner's arguments noted above. Such authority constitutes "other substantial grounds available to petitioner although not previously presented" within the meaning of Rule 58(2).

Argument

Giving substantial additional support to petitioner's arguments (1) that the trial court's refusal to consider the impeachment value of the tapes constitutes reversible error, and (2) that the trial court abused its discretion under the circumstances by denying petitioner's motions for polygraph testing, are several cases dealing with the propriety of considering a witness' prior record of convictions for impeachment purposes.[2] While these cases are not directly in point, they contain language expressing a judicial philosophy which, we submit, was violated by the trial court's rulings as noted above.

In approving admission of the criminal records both of the defendant (who had testified in his own behalf) and of the complaining witness, Circuit Judge Warren Burger (now Chief Justice of this Court), speaking for a panel of the Court of Appeals, stated:

> "It [defendant's criminal record] was received because the case had narrowed to the credibility of two persons—the accused and his accuser—and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed." *Gordon* v. *United States,* 383 F.2d 936, 941 (D.C. Cir. 1967).

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[2] The authorities relied upon herein, while substantially supportive of petitioner's arguments concerning the trial court's erroneous failure to consider the impeachment value of the tapes and that court's abuse of discretion in denying his motions for polygraph testing, arose in a different though related area of criminal law, thus explaining counsel's failure to include such authorities in the Petition for Certiorari. Counsel states that he discovered these authorities on January 27, 1975, while researching the law in an unrelated case and immediately perceived their value as supportive of petitioner's arguments.

This language from *Gordon* has been cited with approval by another Court of Appeals in an opinion similarly holding such evidence properly admissible, as follows:

> "[I]n the *Gordon* case it was observed that where a verdict depended primarily on the jury's assessment of the credibility of the accused and of his accuser, 'there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed.' 383 F.2d at 941." *United States* v. *DiVarco*, 484 F.2d 670, 677 (7 Cir. 1973).

One can scarcely imagine a clearer case than petitioner's wherein it may be said that the verdict depended primarily upon the court's "assessment of the credibility of the accused and of his accuser". Hence, in accordance with the judicial philosophy expressed in the aforecited cases, the court had "compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed."

Yet, by disregarding the impeachment value of the government tapes and by denying petitioner's motions for polygraph testing of himself and his accuser, the trial court violated this enlightened precept. Rather than "exploring all avenues which would shed light" on the credibility question, the trial court closed the blinds.

In effect, petitioner's guilt was determined by a fact-finder who precluded himself from consideration of relevant material directly useful in making difficult credibility determinations.

Moreover, even if it may be said *arguendo*, that the trial court did consider the tapes and was within proper bounds of discretion in choosing nonetheless to believe Burks, under the peculiar factual circumstances of this case, judicial discretion clearly was abused by denial of petitioner's motions for polygraph testing.

Convictions wholly based upon the in-court testimony of an unsavory undercover informer[3] whose testimony was substantially impeached by tapes should not be permitted to stand in the face of petitioner's plea that the trial court permit him to take a lie detector test from a licensed examiner, under conditions to be specified by the court, to support his position that he, not the informer, was telling the truth on the witness stand.

Conclusion

Petitioner prays that rehearing be allowed, and that upon rehearing, this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

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[3] Remember, Burks had an extensive criminal record; he was paid a total of $17,000 by the government for his "cooperation"—more money than he had ever legitimately earned in his life,—and he was assisted by federal agents in connection with a State pimping criminal charge while petitioner's case was pending. See Pet. pp. 13-14.

CERTIFICATE OF COUNSEL

Undersigned, counsel for petitioner hereby certifies that the petition for rehearing is presented in good faith and not merely for the purpose of delay and is limited to the grounds specified in Supreme Court Rule 58(2). As is set out in the Petition, other substantial grounds are raised which are available to the petitioner, although not previously presented.

.....

JULIUS LUCIUS ECHELES
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